BENJAMIN F. SANDERSON, SR.

IBLA 74-166 Decided July 8, 1974

Appeal from decision of California State Office, Bureau of Land Management, rejecting application CA 456 for Indian allotment of national forest land.

Affirmed as modified.

Act of June 25, 1910--Indian Allotments on Public Domain: Generally--Indian Allotments on Public Domain: Lands Subject to

An Indian allotment application for national forest land will be rejected by the Department of the Interior in the exercise of its discretion when it is determined that the public interest requires retention of the land applied for in federal ownership.

APPEARANCES: Richard A. Smith, of Becker, Cox & Smith, Eureka, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

On August 1, 1972, Benjamin F. Sanderson, Sr., filed Indian allotment application CA 456 for about 46 acres of land straddling the Klamath River in sections 2 and 11, T. 10 N., R. 5 E., Humboldt Meridian, in Six Rivers National Forest, California. The application was filed pursuant to section 4 of the General Allotment Act of February 8, 1887, 25 U.S.C. § 334 (1970), as supplemented by section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1970). The 1910 Act provides that the Secretary of the Interior may, "in his discretion," grant allotments to any qualifying Indian who is "occupying, living on, or having improvements on land" in a national forest. Pursuant to the mandate of section 337 regarding allotment applications for national forest land, the application was submitted to the Forest Service, Department of Agriculture, for a determination whether the lands are more valuable for agricultural or grazing purposes, or for the timber found thereon. The Forest Service report filed June 13, 1973, stated that:

> It is apparent that the applied for National Forest lands are not valuable for agricultural or grazing purposes. Accordingly, it becomes unnecessary to determine whether the value of the timber found thereon exceeds the value of the land for agriculture or grazing purposes * * *.

After an exchange of correspondence directed at clarifying the Forest Service report quoted above, the BLM on November 29, 1973, issued a decision rejecting the allotment application on the grounds that the lands are neither available nor suitable for Indian allotment. The land was held to be unavailable due to the withdrawal effected by Power Project No. 62, dated October 25, 1920, and due to Executive Order 11,296 (1966), which establishes a federal policy against the disposal of public land located on flood plains. The BLM also held that the land is unsuitable for allotment because it has only "nominal and incidental" values for agriculture and grazing, and it does have value for "watershed management, recreation and scenic backdrop."

On appeal, the applicant challenges the BLM finding that because the land has been unoccupied since 1955, settlement must be deemed to begin only at the date of the application. He admits the lack of occupation but asserts that his claim is based upon the statutory alternative to occupation, improvements on the land; namely, family graves, fruit trees and a dwelling damaged in the 1964 flood. 1/ In addition, the applicant challenges the BLM's findings on both the availability and suitability of the land. He claims that Executive Order 11,296 does not operate as an absolute bar to granting an allotment, and that the application involved in Power Project No. 62 was rejected long ago, so that the land should be deemed available.

Appellant requests that this Board order a hearing, pursuant to 43 CFR 4.415, to allow appellant to show that the suitability requirement has been discriminatorily applied in this case. On the

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1/ Appellant states the dwelling was built in 1930 by appellant and his brother, and occupied until 1955 by appellant's brother but not appellant.

We have some doubt but need not decide whether the damaged structure and family graves may be considered as improvements of the applicant within the meaning of the 1910 Act, and other questions raised by these facts and appellant's contention that such "improvements" would suffice to give a right to appellant under the Act.

issue of suitability, the applicant argues that the Forest Service conclusion, adopted by the BLM, that the land was not more valuable for agricultural or grazing purposes than for timber purposes is contradicted by the Forest Service report itself, which states that the land has no value for commercial timber, and "nominal and incidental" value for agricultural purposes. He argues that the statute asks only for a comparison of values by the Forest Service. Curtis D. Peters, 13 IBLA 4, 6, 80 I.D. 595, 596-597 (1973). Use of the proper test, he concludes, leads only to the conclusion that the allotted area is more valuable for agricultural or grazing purposes than for timber purposes.

A determination by the Secretary of Agriculture that the land is not more valuable for agriculture or grazing than for the timber found thereon is binding on the Department of the Interior, and precludes the granting of an allotment for that land. Donald Miller, 15 IBLA 95, 99, 81 I.D. 111, 113 (1974); Junior Walter Daugherty, 7 IBLA 291, 294-95 (1972). However, the Forest Service report in this case is a recommendation to the Secretary of the Interior that this Department reject the application in the exercise of the discretion authorized by the statute. We thus find it unnecessary to rule on the appellant's contention that the Forest Service did not properly apply the statutory comparison of values test in the report recommendations, nor would any useful purpose be served by remanding the case for submission to the Forest Service for clarification.

In the exercise of the discretion vested by the statute in this Department, we uphold the Bureau's decision and find that the land applied for is not suitable for allotment, and that the public interest requires retention of this land in federal ownership. This conclusion follows from consideration of the following factors pertaining to this land and governing Indian allotments generally.

First, the lands involved, except for 6.05 acres of steep wooded slope, are either in the river channel or in the flood plain of the Klamath River and were completely inundated in 1955 and [Illegible Word]. Executive Order 11,296 (1966) established a federal policy against the disposal of public land located on a flood plain. We agree with appellant that the Executive Order is not an absolute bar to granting an allotment, but we do consider the possibility of flood damage, as has occurred in the past on this stretch of the Klamath river, and the strong policy enunciated in that Order as an important factor militating against the issuance of an allotment for this land.

Second, this stretch of the Klamath River is under study for possible inclusion in the Wild and Scenic Rivers System, pursuant to the Wild and Scenic Rivers Act, 16 U.S.C. § 1271 et seq. (1970). 35 F.R. 16693 (1970). While notice of potential inclusion does not

operate to segregate the land or withdraw it from disposal under the public land laws, see 16 U.S.C. § 1279(a) (1970), it does indicate the value attached to this land for at least some of the public purposes set out in the Act: "scenic, recreational, geologic, fish and wildlife, historic, cultural or other similar values." 16 U.S.C. § 1271 (1970). The notice of potential inclusion requires a tentative finding by the agencies with jurisdiction over the land that these values are present. 16 U.S.C. § 1275(a) (1970). The notice of potential inclusion also militates in favor of preserving federal ownership of this tract to protect the public values the Act has deemed worth formal protection.

Third, the Forest Service report indicates that the wooded slope portion of the land applied for "does have public value because of the amenities that the timber thereon renders in form of watershed, recreation and scenic backdrop." The commercial and non-commercial values the timber on the land adds are properly considered by this Department in the exercise of the statutory discretion.

Fourth, the Forest Service report concluded, and the BLM decision found, that the land applied for cannot support an Indian family. The report and decision conclude that the land would only be nominally valuable for grazing since it could only support several animals; similarly, the land is not valuable for agriculture since it could only "be expected to produce a limited amount of agricultural products."

The authority of the Secretary of the Interior to reject allotment applications for public land that is not an economic unit is well established. Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969); Finch v. United States, 387 F.2d 13, 15-16 (10th Cir. 1967); John E. Balmer, 71 I.D. 66 (1964). The purpose of section 4 of the General Allotment Act, and thus section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1970), providing for allotments in the national forests as well, was to allot lands capable of supporting the Indian settler. The record supports the conclusion that the land has only nominal agricultural and grazing value and does not constitute an economic unit. This is another factor to be considered in determining whether the public interest would be served in allotting the land applied for.

The four factors bearing on the case discussed above taken together --Executive Order 11,296; the notice of proposed inclusion in the Wild and Scenic River system; the value of the wooded portion of the land for the purposes of watershed, recreation and scenic backdrop; and the BLM conclusion that the land does not constitute an economic unit and has only marginal value for agriculture

and grazing – all support the conclusion that it would not be in the public interest, nor would it fulfill the purposes of the Allotment Act, to allot the lands involved.

Appellant's brief contains a motion for a hearing pursuant to 43 CFR 4.415, at which he proposes to demonstrate that the suitability requirement that the land be an economic unit has been wrongly and discriminatorily applied. Because we find, in the exercise of the statutory discretion, that the land is unsuitable for allotment for all the reasons discussed above, and the public interest requires retention of the land, no purpose would be served by such a hearing, and the motion is rejected. H. L. Bigler, 11 IBLA 297 (1973); Elaine S. Stickelman, 9 IBLA 327 (1973). Nor does appellant have any right to a hearing on a matter involving the Secretary's discretion to approve allotments. See Richard K. Todd, 68 I.D. 291, 300 (1961), approved in Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965).

We similarly find it unnecessary to rule on appellant's challenge of the BLM finding that settlement must be deemed to begin on the date of the application. Notwithstanding the alleged existence of improvements on the claim, we find that it would not be in the public interest to allot the land applied for.

In any event, the land is not available for allotment while it is withdrawn for power purposes; nor in these circumstances would we recommend to the Federal Power Commission that the lands be made available and the withdrawal lifted pursuant to 16 U.S.C. § 818 (1970), and 43 CFR 2344.3.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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Joan B. Thompson
Administrative Judge

We concur:

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Edward W. Stuebing
Administrative Judge

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Anne Poindexter Lewis
Administrative Judge